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In The

Supreme Court of the United States

October Term, 1996

THE SHAW AGENCY AND SCOTT HANKINS,

Petitioners,

v.

MARGERY A. MORSTEIN,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL T. THORNTON
Counsel of Record for The Shaw Agency and Scott Hankins
MICHAEL T. THORNTON, P.C.
6085 Lake Forrest Drive
Suite 100
Atlanta, Georgia 30328
(404) 845-0600

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OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Margery A. Morstein's suit arises out of the denial of medical benefits under a plan established and sponsored by her employer. Morstein has asserted state law claims against her alleged insurance agency and agent, The Shaw Agency and Scott Hankins.

The issue presented is whether Morstein's state law fraudulent inducement and negligence claims against The Shaw Agency and Scott Hankins "relate to" Morstein's employee benefit plan and, therefore, are preempted by the Employee Retirement Security Act of 1974 (ERISA).

PARENT COMPANIES

There are no parent companies or nonwholly owned subsidiaries to be listed.

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia, Civil Action No. 1:92-CV-2686-RLV granted summary judgment to The Shaw Agency and Scott Hankins. A copy is attached in Appendix A hereto ("App. A") at page A-36.

The original appellate panel opinion of the United States Court of Appeals for the Eleventh Circuit affirmed the district court's grant of summary judgment in *Morstein v. National Ins. Serv., Inc.*, 74 F.3d 1135 (11th Cir. 1996). App. A-23. The Eleventh Circuit vacated the original panel and granted Morstein's suggestion for rehearing *en banc* in *Morstein v. National Ins. Serv. Inc.*, 81 F.3d 1031 (11th Cir. 1996). App. A-41. The Eleventh Circuit, sitting *en banc*, reversed the district court's grant of summary judgment in an order entered August 19, 1996. App. A-1.

JURISDICTION

On January 25, 1994, the United States District Court for the Northern District of Georgia entered an order granting The Shaw Agency and Scott Hankins' motion for summary judgment based on ERISA preemption.

On September 21, 1994, Morstein filed a Notice of Appeal with the United States District Court for the Northern District of Georgia. On February 12, 1996, the original panel of the United States Court of Appeals for the Eleventh Circuit issued an order affirming the district court's grant of summary judgment.

On April 11, 1996, the Eleventh Circuit entered an order vacating the previous panel's opinion and granting a rehearing *en banc*. On August 19, 1996, the Eleventh Circuit entered an order reversing the district court's grant of summary judgment to The Shaw Agency and Scott Hankins.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED IN THIS CASE

Section 514(a) of the Employee Retirement Income Security Act (ERISA) provides that its provisions "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) of this title and are not exempt under Section 1003(b) of this title".

STATEMENT OF THE CASE

Respondent Morstein's suit arises out of the denial of medical benefits under a plan established and sponsored by her employer. In her original complaint, Morstein asserted state law claims against National Insurance Services ("NIS"), Pan American Life Insurance Company ("Pan American"), The Shaw Agency and Scott Hankins ("Hankins"). Morstein's suit was initially filed in the Superior Court of Fulton County, Georgia in October of

1992. In November of 1992, defendants NIS and Pan American removed the action to the U. S. District Court for the Northern District of Georgia pursuant to *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987) and *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). The Shaw Agency and Hankins consented to removal of the case.

In February, 1993, Morstein filed a motion to remand this action to the state court, arguing that ERISA did not preempt her claims. The district court denied Morstein's motion in an order dated March 23, 1993. Despite the district court's ruling that removal was appropriate on the basis of defendants' ERISA preemption defense, Morstein chose not to drop her state law claims or even to amend her complaint within the period for filing such motions under U. S. District Court for the Northern District of Georgia Local Rule 220-1(a)(2).

Five days after the discovery period expired, within the time allowed by law, The Shaw Agency and Hankins filed a motion for summary judgment on the ground that Morstein's claims against them involved state tort law claims preempted by ERISA. The Shaw Agency and Hankins urged that no valid ERISA claims existed against them and that ERISA did not provide any relief for Morstein's claims against them.

On July 13, 1993, defendants NIS and Pan American joined in Petitioner's motion for summary judgment. At the same time, NIS and Pan American filed a motion for an extension of time in which to file a separate motion for summary judgment and supporting brief. An order granting NIS and Pan American's motion for an extension was

entered on July 19, 1993. On July 20, 1993, NIS and Pan American filed a separate motion for summary judgment, also on ERISA preemption grounds.

On July 9, 1993, Morstein filed a response brief in opposition to The Shaw Agency and Hankins' motion for summary judgment. On July 19, 1993, The Shaw Agency and Hankins filed a reply brief in support of said motion.

After all motions for summary judgment had been filed and after Morstein had responded to each, she moved the court for leave to amend her complaint to assert ERISA claims against all the defendants. On July 25, 1994, the district court entered an order granting The Shaw Agency and Hankins' motion for summary judgment. The order held that Morstein's claim for relief was limited to a claim made pursuant to ERISA. The court further found that Morstein had no valid claims under ERISA against either The Shaw Agency or Hankins. Therefore, the court denied Morstein's motion to amend the complaint as to The Shaw Agency and Hankins.

In addition, the district court found that Morstein's claims against NIS and Pan American also were preempted by ERISA; however, as it was not as clear that Morstein had no ERISA claims against NIS and Pan American or that they were inappropriate parties for the plaintiff's ERISA claim, the court granted those defendants' motion for summary judgment as related to the state law claims, but granted Morstein's motion to amend her complaint to allege ERISA claims against them.

On February 16, 1994, Morstein filed a Notice of Appeal to the U.S. Court of Appeals for the Eleventh Circuit from the order granting summary judgment to

The Shaw Agency and Scott Hankins. On February 28, 1994, The Shaw Agency and Hankins filed a motion objecting to Morstein's Notice of Appeal on the grounds that no final judgment had been entered in the case and the court's January 25, 1994 order did not indicate that it was subject to immediate appeal. Morstein ultimately abandoned her Notice of Appeal when it became apparent that the appeal was premature.

Morstein then moved the district court to modify its order granting summary judgment to The Shaw Agency and Hankins to certify the matter for immediate appeal. Morstein's motion to certify the order was denied by the district court on June 20, 1994. Thereafter, Morstein and NIS and Pan American reached a settlement of Morstein's claims against each of those defendants. Pursuant to the terms of the settlement, Morstein dismissed her claims against those defendants and the district court entered a final judgment in this matter on September 14, 1994.

Morstein filed her Notice of Appeal on September 21, 1994. On February 12, 1996, the original panel of the United States Court of Appeals Eleventh Circuit issued an order affirming the district court's grant of summary judgment.

On April 11, 1996, the Eleventh Circuit entered an order granting Morstein's request for a rehearing *en banc*. On August 19, 1996, the Eleventh Circuit, sitting *en banc*, entered an order vacating the original panel's decision and reversing the district court's grant of summary judgment.

Subject Matter Jurisdiction

Morstein's complaint constitutes a claim by a participant under an employee benefit plan governed by ERISA. 29 U.S.C. Section 1001 *et seq.* Under the express language of ERISA, any claim that relates to an employee benefit plan is preempted by ERISA. 29 U.S.C.A. Section 1144(a). This action was timely removed from the state court pursuant to 28 U.S.C.A. Section 1338, 1441(a) and 29 U.S.C. Section 1132(a)(1)(B) pursuant to *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1978). Any civil action of which a federal court has original jurisdiction may be removed by the defendant to the appropriate federal court. 28 U.S.C.A. Section 1441(a).

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's *En Banc* Opinion Conflicts With Relevant Decisions of This Court Regarding ERISA Preemption of Common Law Tort Claims.

The decision below conflicts with this Court's decisions in *Shaw v. Delta Airlines*, 463 U.S. 85 (1983) and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), as well as the recent case of *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___ (1995). The question before the Eleventh Circuit was whether state common law fraudulent inducement and negligence claims are preempted because they related to an ERISA plan. The Eleventh Circuit, sitting *en banc*, misread this Court's decision in the *New York Blue Cross* case and, as a

result, applied a too restrictive test to determine whether the claims involved in this case related to an ERISA plan.

Rather than creating a new test to define the phrase "relate to" in Section 514(a) of ERISA, the *New York Blue Cross* decision affirmed the analysis announced in the *Shaw* case. This Court in *Shaw* stated that 'a law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a *connection with* or *reference to* such a plan." *Shaw*, supra, 498 U.S. at 139. (emphasis added) In *New York Blue Cross*, the Court attempted to employ the *Shaw* analysis to determine whether a New York statute requiring hospitals to collect surcharges from patients covered by commercial insurers but not from patients insured by Blue Cross related to an ERISA plan. This Court attempted to apply both tests to the statute in question and found initially that the statute did not make "reference to" such a plan because the surcharges were imposed upon patients regardless of whether the charges were ultimately secured by an ERISA plan or some other method of payment. Accordingly, the "reference to" test enunciated in the *Shaw* case is still applicable in determining whether state claims law relate to ERISA plans, even though this Court answered that question in the negative with respect to the statute under inquiry in the *New York Blue Cross* case.

Morstein's claims in this case are based upon Georgia common law fraud in the inducement and negligence causes of action. Without question, the cases giving rise to these common law causes of action do not make specific reference to ERISA or ERISA plans. However, in order

to prove either cause of action, Morstein would necessarily have to direct the attention of the finder of fact to the ERISA plan in question.

For example, it is axiomatic that Morstein, in order to prevail upon her fraudulent inducement claim, would have to prove a misrepresentation by Hankins, her alleged agent, with regard to the coverage to be provided by the plan he attempted to procure for her. Necessarily, the finder of fact, in order to determine whether a misrepresentation had been made, would have to examine carefully the terms, conditions and exclusions of the insurance policy issued in connection with Morstein's plan. Likewise, an examination of the policy language would be required to determine if Morstein justifiably relied upon the alleged representations following receipt of any plan benefit information provided by the plan fiduciary, as justifiable reliance is another element of a fraud claim under Georgia law.

With regard to the negligence cause of action, Morstein has alleged that Hankins negligently prepared the application for the insurance policy constituting Morstein's plan with respect to health insurance benefits. Again, in order to determine the validity of Morstein's common law negligence claim, the finder of fact would have to examine the application and all other underwriting information provided to the plan fiduciary prior to and in connection with issuance of the policy in question.

In short, proof of Morstein's state law claims requires "reference to" the ERISA plan, specifically, the insurance policy documents which constitute the health insurance

benefits provided to Morstein by her employer. Petitioners urge that the "relate to" test in the *Shaw* case has not been eliminated by the decision in *New York Blue Cross* and that the test remains a two part test, one part of which allows a finding that the state common law claims made in this action relate to Morstein's ERISA plan because they necessarily have "reference to" the plan itself.

Only with regard to the second part of the *Shaw* test did this Court break new ground with regard to ERISA preemption analysis in the *New York Blue Cross* case. Finding that "connections" are as difficult to limit as "relations", this Court reasoned that strict textualism would be of little benefit in attempting to apply the "connection with" part of the *Shaw* test. Rather, the Court indicated that the "connection with" analysis should be aimed at attempting to determine what state law claims Congress intended to survive ERISA preemption when Section 514(a) was drafted.

To determine whether Morstein's state law claims in this case have a "connection with" an ERISA plan, then, one must determine whether Congress intended such claims to survive following passage of ERISA. Congress created a detailed and comprehensive remedial scheme set forth in Section 502 of the statute. If Congress had intended ERISA claimants to have available to them, in addition to ERISA remedies, the full compliment of state law remedies in each of the fifty states, creation of the remedial scheme in Section 502 would have been unnecessary and superfluous.

Moreover, survival of state law remedies would defeat the intent of Congress to insure the uniform application of the remedial scheme created by ERISA. Survival of such state law claims would theoretically give ERISA claimants two opportunities to obtain compensation, one pursuant to the list of remedies outlined in Section 502 and another based upon state common law causes of action and the damages recoverable pursuant to those causes of action.

Interestingly, Morstein was given an opportunity to amend her pleadings to assert ERISA claims against NIS and Pan American but chose instead to reach a settlement with those parties in order to pursue state law claims against The Shaw Agency and Hankins. If Morstein is allowed to pursue such state law remedies and obtains a judgment in her favor, she will have effectively circumvented the limited remedies provided by Congress in Section 502 and recovered damages in excess of that which Congress deemed appropriate.

The Eleventh Circuit *en banc* decision suggests that this Court " . . . turned the tide on the expansion of the preemption doctrine . . . " in the *New York Blue Cross* case. Instead, that decision merely continued to recognize that the two-part test set forth in *Shaw* is still applicable in ERISA preemption cases and that determining the intention of Congress remains a paramount endeavor in any attempted statutory construction case. In deciding this case, the Eleventh Circuit applied only one part of the *Shaw* test, finding that the respondent's state law claims had no "connection with" the ERISA plan in question. Although petitioners disagree with such a finding, even employing the less literal analysis outlined by this Court

in *New York Blue Cross*, they would urge that the Eleventh Circuit gave little, if any, consideration to the second part of the *Shaw* test. The state law claims urged against The Shaw Agency and Hankins clearly require "reference to" the ERISA plan at issue, just as similar state common law claims made against the plan fiduciary in *Pilot Life Ins. Co. v. Dedeaux, supra*, were deemed by this Court to "relate to" an ERISA plan. The Court in that case stated the following with regard to the breach of contract, breach of fiduciary duty and fraudulent inducement claims made against the insurer:

> There is no dispute that the common law causes of action asserted in Dedeaux's complaint "relate to" an employee benefit plan and therefore fall under ERISA's express preemption clause, Section 514(a)." *Pilot Life*, 481 U.S. at 47.

II. This Court Has Not Decided The Scope of ERISA Preemption of Claims Against Independent Insurance Agents and Should Settle Such Questions So As to Give Guidance to the Circuit Courts.

The Eleventh Circuit found no decisions of this Court dealing specifically with preemption of fraudulent inducement and negligence claims against independent insurance agents. Such dearth of authority is surprising since independent insurance agents play a significant role in the marketing of the health insurance and other coverages which underlie the typical ERISA plan. The activities of such agents are instrumental in initiating discussions concerning various types of coverages, preparing and submitting applications to insurers and servicing existing

plans once insurance coverage is issued. In short, independent insurance agents, such as the petitioners in this case, serve as a liaison between the employer, the plan beneficiaries and the plan fiduciary with respect to marketing, implementation, administration and servicing of the plan.

In light of the above, it is curious that the Eleventh Circuit cited and relied upon *Perkins v. Time Ins. Co.*, 898 F.2nd 470 (5th Cir. 1990) with respect to the proper analysis to follow in an ERISA preemption case concerning insurance agents. The Fifth Circuit in *Perkins* did not apply the *Shaw* two-part test but rather sought to determine whether the state law claims asserted against the alleged non-ERISA entity, the insurance agent, affected the relations among the principal ERISA entities involved in the case. The *Perkins* court, and the Eleventh Circuit in this case, concluded that the ERISA entities included only the employer, the plan, the plan fiduciaries and the beneficiaries under the plan. As the insurance agent was not included within that group, the *Perkins* court reasoned that state law claims made against such agent did not relate to the ERISA plan.

Such reasoning is contrary to the analytical scheme followed by this Court in ERISA preemption cases. Although the *Perkins* decision made no effort to determine whether the state law claims involved in that case were among those Congress intended to survive ERISA preemption, the Eleventh Circuit grappled with the question in its *en banc* opinion. The Eleventh Circuit reasoned that Congress enacted ERISA to protect the interest of employees and beneficiaries of employee benefit plans and that protection of insurance agents from common law

fraud and negligence claims would not further that purpose because plan administrators could not rely upon the representations of such agents in attempting to make decisions about their employee benefit plans.

First, the Eleventh Circuit has not faithfully followed the direction of this Court in *New York Blue Cross* because the question that should be posed is not what Congress intended to accomplish by passing the ERISA statute but rather what state laws Congress intended to remain standing with regard to employee benefit plan regulation once ERISA and its preemption clause became effective. Given the comprehensive remedial scheme included within the ERISA statute, it is unlikely that Congress intended state law fraudulent inducement and negligence claims to remain viable, particularly where the plan beneficiary had ERISA claims available to her, as Morstein did in this case.

Second, the Eleventh Circuit chose to deal with this analytical problem in a theoretical vacuum far removed from today's employee benefit market place. The Eleventh Circuit seems to assume that employers and their employees have employee benefit plans available from only one source; in reality, there are many insurance agents offering a variety of insurance products in order to meet the needs of employers and their employees. However, because of the Eleventh Circuit's decision, independent insurance agents now subject to fraud and negligence claims whenever an employee's claim for benefits is denied may leave the health insurance market place, thereby making it more difficult for employers to

provide employee benefit plans including health insurance at any cost. Even under the Eleventh Circuit's analysis, subjecting insurance agents to state law fraud and negligence claims does not serve the purpose of Congress in enacting ERISA, assuming that purpose was to make employee benefit plans available.

Neither the analytical approach of the Fifth Circuit in the *Perkins* case nor the Eleventh Circuit's strained effort to follow this Court's guidelines in *New York Blue Cross* provide an adequate framework for deciding whether state common law fraud and negligence claims "relate to" an employee benefit plan so as to trigger ERISA's preemption clause. For that reason, petitioners urge this Court to grant certiorari in this matter.

CONCLUSION

For the within and foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

MICHAEL T. THORNTON
Georgia Bar No. 710487
MICHAEL T. THORNTON, P.C.
6085 Lake Forrest Drive, Suite 100
Atlanta, Georgia 30328
(404) 845-0600

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-9152

D. C. Docket No. 1:92-cv-2686-RLV

MARGERY A. MORSTEIN,

Plaintiff-Appellant,

versus

NATIONAL INSURANCE SERVICES, INC.;
PAN AMERICAN LIFE INSURANCE
COMPANY; THE SHAW AGENCY;
SCOTT HANKINS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(August 19, 1996)

Before TJOFLAT, Chief Judge, and KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges.

BIRCH, Circuit Judge:

This case was taken en banc to clarify the law in our circuit regarding state law preemption by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29

U.S.C. §§ 1001-1461 (1985). In this appeal, we must decide whether state law claims asserted against an independent insurance agent and his agency for fraudulent inducement to purchase and negligence in processing an application for an ERISA-governed insurance plan sufficiently relate to an employee benefit plan within the meaning of section 514(a) of ERISA, 29 U.S.C. § 1144(a), so as to be preempted. Because we find that the state law claims in this case do not sufficiently relate to the employee benefit plan to be preempted by ERISA, we reverse the district court's grant of summary judgment in favor of the insurance agent and his agency.

I. FACTS

Plaintiff-appellant, Margery Morstein, is the president, director, and sole shareholder of Graphic Promotions, Inc. ("Graphic"). At all times relevant to this appeal, Morstein was one of two employees of Graphic. In 1991, Morstein met with Scott Hankins, an insurance broker and employee of the Shaw Agency, for the purpose of obtaining a replacement policy of major medical insurance for herself and Graphic's other employee. The policy was to be administered by National Insurance Services, Inc. ("National") and underwritten by Pan-American Life Insurance Company ("Pan-American").[1] Morstein alleges that during her meeting with Hankins, she advised him that any policy of major medical insurance that would replace her current policy would be

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[1] Morstein voluntarily dismissed National and Pan-American before the commencement of this appeal, although they were defendants in the original action.

unacceptable if it excluded from coverage medical treatment related to any preexisting medical condition. Morstein asserts that Hankins assured her that the policy that he proposed would provide the same coverage for preexisting conditions as her current policy. The policy offered by Hankins was issued to Graphic, and Graphic paid the initial premium.

Over one year after the policy was issued, Morstein underwent total hip replacement surgery. When she submitted a claim for payment for this procedure, National refused payment because it asserted that Morstein's surgery treated a preexisting condition, which she failed to disclose during the application process. National then rescinded the policy and refunded to Graphic the premium payments that were made on behalf of Morstein. Morstein claims that Hankins and the Shaw Agency fraudulently induced her to purchase a policy of major medical insurance and that she therefore allowed a separate full-coverage insurance policy to lapse. She further alleges that Hankins and the Shaw Agency were negligent in processing her application for insurance and that she has state law claims against them for negligence and fraud.[2]

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[2] The Shaw Agency is an independent agency or brokerage that is authorized to write policies for several insurance companies. *See* Hankins Depo. at 11-14. In Georgia, independent insurance agents are generally considered to be agents of the insured, not the insurer. *European Bakers, Ltd. v. Holman*, 338 S.E.2d 702, 704 (Ga. App. 1985), *cert. denied* (Jan. 17, 1986).

Morstein filed an action in state court, alleging negligence, malfeasance, misrepresentations, and breach of contract. Defendants removed the action to federal court on the basis that Morstein's claims were governed by ERISA. The district court denied Morstein's motion to remand and found that defendants were entitled to summary judgment as to the state law claims against them. The district court concluded that Morstein's claims "clearly relate to the employee benefit plan established by Graphic Promotions; therefore, those claims are preempted by ERISA." R2-29-3. Morstein appealed the district court's grant of summary judgment, and the original appellate panel in this case reluctantly affirmed the district court's grant of summary judgment and held that it was bound by our decision in *Farlow v. Union Cent. Life Ins. Co.*, 874 F.2d 791 (11th Cir. 1989). *Morstein v. National Ins. Servs., Inc.*, 74 F.3d 1135, 1138-39 (11th Cir.), *vacated and reh'g en banc granted*, 81 F.3d 1031 (11th Cir. 1996).

The original panel found the facts in this case to be duplicative of the facts in *Farlow*.[3] *Id.* at 1137. The panel, therefore, was bound to adhere to the holding of *Farlow*

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[3] In *Farlow*, plaintiff was a shareholder, president, and member of the board of directors of Pace-Plus, Inc. Farlow and his wife were designated beneficiaries under Pace-Plus's employee benefit plan. The Farlows alleged that an insurance agent induced them to purchase a new group health life insurance plan, and that the insurance agent fraudulently misrepresented that, among other things, the new policy would provide the same coverage as the company's old policy. *Farlow*, 874 F.2d at 792. After switching to the new policy, Farlow's wife became pregnant. The Farlows then discovered that, unlike Pace-Plus's old policy, the new policy did not provide maternity or pregnancy coverage. *Id.*

that ERISA preempted a designated beneficiary's state law misrepresentation and negligence claims against an insurance company and its agent.[4] Following our decision in *Farlow*, several district courts in our circuit, faced with similar state law claims, have attempted to distinguish their cases from *Farlow*. *See Wiesenberg v. Paul Revere Life Ins. Co.*, 887 F. Supp. 1529, 1532-33 (S.C. Fla. 1995) (reasoning that the decision in *Farlow* was ambiguous with regard to whether or not its holding applied to independent insurance agent as well as the insurance company, and turning to law in other circuits to support its holding that Wiesenberg's state law fraud claims against the insurance agency and its agent were not preempted by ERISA); *Barnet v. Wainman*, 830 F. Supp. 610, 611-12 (S.D. Fla. 1993) (finding no preemption of plaintiff's claims against insurance agent for fraudulent misrepresentation because, unlike *Farlow*, the scope of coverage of plaintiff's claim would not be the focus of the litigation); *Martin v. Pate*, 749 F. Supp. 242, 246-47 (S.D. Ala. 1990) (finding

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[4] Our court found the conduct alleged by the Farlows to be "intertwined" with the refusal to pay benefits:

> [T]he conduct alleged in these claims is not only contemporaneous with [the insurer's] refusal to pay benefits, but the alleged conduct is intertwined with the refusal to pay benefits. Finding the Farlows' state law claims not wholly remote in content from the [insurer's] plan, we reject the Farlows' contention that simply because their claims invoke misconduct in the sale and implementation of the [insurer's] plan, their claims do not relate to the plan.
>
> Consequently, we hold that ERISA preempts the Farlows' misrepresentation and negligence claims.

Farlow, 874 F.2d at 794.

"the applicability of *Farlow* to the facts of this case" to be "questionable" and holding that plaintiff's state law claim of fraudulent misrepresentation of coverage of policy was not preempted), *aff'd sub nom. Martin v. Continental Investors*, 934 F.2d 1265 (11th Cir. 1991) (table).

Our decisions in the ERISA preemption area have been neither consistent nor clear. Since *Farlow* was decided, the Supreme Court and several other circuit courts have issued opinions that clarify the purpose and intent of the ERISA state law preemption doctrine. Furthermore, the conflict among the district courts in our circuit demands that we revisit this issue and attempt to provide some clear guidance in the morass of ERISA preemption law. We find it helpful, therefore, to trace the development of the preemption doctrine before applying the words of the statute to the case at bar.

II. ANALYSIS

Morstein alleges that the district court erred in applying the preemption doctrine under ERISA to bar her state law claims and thus erred in granting summary judgment in favor of Hankins and the Shaw Agency. We review a grant of summary judgment *de novo*. *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1404 (11th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 906, 130 L. Ed. 2d 788 (1995).

A. ERISA Legislative History

The Supreme Court has described the overall intent of ERISA as follows: "ERISA is a comprehensive statute

designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S. Ct. 2890, 2896, 77 L. Ed. 2d 490 (1983); *see also Lordmann Enters., Inc. v. Equicor, Inc.*, 32 F.3d 1529, 1533 (11th Cir. 1994), *cert. denied*, ___ U.S. ___, 116 S. Ct. 335, 133 L. Ed. 2d 234 (1995). Section 514(a) of ERISA provides that its provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and are not exempt under section 1003(b) of this title." 29 U.S.C. § 1144(a) (1985).[5]

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[5] Section 1003(a) provides that ERISA applies to all employee benefit plans established or maintained "by any employer engaged in commerce or in any industry or activity affecting commerce." 28 U.S.C. § 1003(a) (1985). The exemptions described in section 1003(b) are not applicable in this case. *Id.* at § 1003(b).

An "employee benefit plan" is defined under ERISA as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." *Id.* at § 1002(3) (1985).

The medical insurance policies involved in this case qualify as "employee welfare benefit plans", which, together with the term "welfare plan," are defined in ERISA section 3(1) as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment,. . . .

Id. at § 1002(1).

Unfortunately, the statute does not define the term "relate to," and it has fallen to the courts to deduce Congress's intent and apply this interpretation to the facts of each case that arises. A search through the volumes of legislative history of ERISA provides very little information regarding federal preemption of state law.

The Supreme Court in *Shaw* relied heavily on the statements of Representative Dent and Senators Williams and Javits in support of its conclusion that the intent of Congress was to preempt broadly. *Shaw,* 463 U.S. at 99-100, 103 S. Ct. at 2901. Both Representative Dent and Senator Williams emphasized the intent of Congress to broadly preempt state and local regulation of employee benefit plans. Representative Dent called the preemption doctrine "the crowning achievement of this legislation," and promised that it would "eliminat[e] the threat of conflicting and inconsistent State and local regulation." 120 Cong. Rec. 29,197 (1974). Senator Williams stated that preemption was "intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." *Id.* at 29,933. Only Senator Javits remarked that the final language of the preemption clause was a product of compromise between the House and Senate versions of the bill and that further evaluation of preemption policy was necessary.[6]

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[6] Senator Javits made the following comments:

> Both House and Senate bills provided for preemption of State law, but – with one major exception appearing in the House bill – defined the perimeters of preemption in relation to the areas

B. Supreme Court Case Law

Because the legislative history is sparse, it has fallen to the courts to interpret the phrase "relate to" and give it

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> regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.
>
> Although the desirability of further regulation – at either the State or Federal level – undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required – but for certain exceptions – the displacement of State action in the field of private employee benefit programs. The conferees – recognizing the dimensions of such a policy – also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to Congress. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made.

120 Cong. Rec. 29,942 (1974).

The ERISA Oversight Report of the Pension Task Force of the Subcommittee on Labor Standards was issued in 1977. Pension Task Force of Subcomm. on Labor Standards of House Comm. on Educ. and Labor, ERISA Oversight Report, H.R. Rep. No. 365, 94th Cong., 2d Sess. (1977). The Task Force concluded that, "[b]ased on our examination of the effects of section 514, it is our judgment that the legislative scheme of ERISA is sufficiently broad to leave no room for effective state regulation within the field preempted. Similarly it is our finding that the

meaning in the context of the facts that arise in each particular case.[7] The Supreme Court noted as early as 1981 that defining boundaries of the preemption doctrine would not be an easy task. *Alessi v. Raybestos-Manhattan,*

Federal interest and the need for national uniformity are so great that enforcement of state regulation should be precluded." *Id.* at 9.

[7] According to Prof. Catherine L. Fisk:

> In the twenty-one years since ERISA was enacted, the Court has rendered decisions with written opinions in twelve ERISA preemption cases, and has decided a number of others without opinion. Preemption cases constitute roughly half of all the ERISA cases the Court has considered. The relatively large number of ERISA preemption opinions has not, however, led to clarity in the law. The lower courts have decided thousands of preemption cases, yet remain mired in confusion about basic points. ERISA preemption offers proof that plain language textualism leads to uncertainty and incoherence in the law.

Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism,* 33 Harv. J. on Legis. 35, 58-59 (1996) (footnotes omitted).

The Supreme Court apparently has not uttered its final word on the issue of preemption either. The Court recently granted certiorari in *Dillingham Construction N.A., Inc. v. Sonoma County,* 57 F.3d 712 (9th Cir. 1995), and requested briefing on the issue of whether Congress intended, in enacting ERISA, to preempt states' traditional regulation of wages, apprenticeship, and state-funded public works construction through a state prevailing wage law that restricts a contractor's payment of lower apprentice-specific wages to apprentices who are registered in programs approved as meeting federal standards. *California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A., Inc.,* ___ U.S. ___, 116 S. Ct. 1415, 134 L. Ed. 2d 541 (1996).

Inc., 451 U.S. 504, 525, 101 S. Ct. 1895, 1907, 68 L. Ed. 2d 402 (1981). In *Alessi*, retired employees challenged a provision in their employer-provided pension plan, which provided that an employee's retirement benefits are offset by any worker's compensation awards for which the employee is eligible, as violating a New Jersey statute that prohibited these offsets. *Id.* at 507-08, 101 S. Ct. at 1898. The Court remarked that it "need not determine the outer bounds of ERISA's pre-emptive language to find this New Jersey provision an impermissible intrusion on the federal regulatory scheme." *Id.* at 525, 101 S. Ct. at 1907. The Court noted that, "[o]ther courts have reached varying conclusions as to the meaning of ERISA's pre-emptive language in other contexts. . . . We express no views on the merits of any of those decisions." *Id.* at n.21 (citations omitted). Nevertheless, the Court indicated that it leaned towards a broad interpretation: "ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern. . . . ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the pre-emption provision." *Id.*

The Court next addressed the preemption issue in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983). The issue before the Court in *Shaw* was whether two New York human rights and disability statutes that prohibited discrimination on the basis of pregnancy were preempted by ERISA. *Id.* at 88, 103 S. Ct. at 2895. The Supreme Court in a prior unrelated case had determined that discrimination based on pregnancy was not actionable under Title VII of the Civil Rights Act of 1964. *Id.; General Elec. Co. v. Gilbert*, 429 U.S. 125, 97 S. Ct.

401, 50 L. Ed. 2d 343 (1976). The Court held that even though ERISA does not contain any provisions proscribing discrimination in the provision of employee benefits, the New York laws were "relat[ed] to" employee benefit plans and, therefore, fell under section 514(a). *Shaw* at 96, 103 S. Ct. at 2899. Citing Black's Law Dictionary in support thereof, the Court made the following attempt to define "relates to":

> A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. Employing this definition, the Human Rights Law, which prohibits employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy, and the Disability Benefits Law, which requires employers to pay employees specific benefits, clearly "relate to" benefit plans. We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.
>
> In fact, however, Congress used the words "relate to" in § 514(a) in their broad sense. To interpret § 514(a) to preempt only state laws specifically designed to affect employee benefit plans would be to ignore the remainder of § 514. It would have been unnecessary to exempt generally applicable state criminal statutes from preemption in § 514(b), for example, if § 514(a) applied only to state laws dealing specifically with ERISA plans.

Id. at 96-98, 103 S. Ct. at 2900 (footnote & citations omitted). Once again, however, the Supreme Court declined to

remark on how broad the preemption language of ERISA sweeps, except to note that there is some boundary:

> Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law "relates to" the plan. . . . The present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line.

Id. at 100 n.21, 103 S. Ct. at 2901 n.21.

The Supreme Court first addressed the issue of whether ERISA preempts state common law tort and contract claims in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987). Dedeaux was injured in an employment-related accident and filed a disability claim with Pilot Life Insurance Company ("Pilot Life"), the provider of Dedeaux's employer's long term disability employee benefit plan. *Id.* at 43, 107 S. Ct. at 1551. When Dedeaux's benefits were terminated by Pilot Life, he instituted a diversity suit against the company alleging tortious breach of contract, breach of fiduciary duties, and fraud in the inducement. *Id.* Pilot Life argued that Dedeaux's state law claims were preempted by ERISA. After discussing the legislative history of ERISA and emphasizing its broad preemptive intent, the Supreme Court held that Dedeaux's state law claims were preempted and that the insurance savings clause did not apply to the claims. The Court did not hesitate in its conclusion that Dedeaux's common law causes of action, "each based on alleged improper processing of a claim for benefits under an employee benefit plan,

undoubtedly meet the criteria for pre-emption under § 514(a)." *Id.* at 48, 107 S. Ct. at 1553.[8]

In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990), an employee brought a state law action against his employer alleging that the employer had wrongfully terminated him in order to avoid contributing to, or paying benefits under, the employee's pension plan. The Court found that the employee's claim was preempted under ERISA. *Id.* at 142, 111 S. Ct. at 484. In discussing whether the claim "relates to" an employee benefit plan covered by ERISA, the Court stated that:

> [I]n order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer has a pension-defeating motive in terminating the employment. Because the court's inquiry must be directed to the plan, this judicially created cause of action "relate[s] to" an ERISA plan.

Id. at 140, 111 S. Ct. at 483.

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[8] The sticking-point for the Court came in its determination of whether the causes of action should be saved under the insurance savings clause. *Pilot Life*, 482 U.S. at 48-50, 107 S. Ct. at 1553-4; 29 U.S.C. § 1144(b)(2)(A). The Court determined that the savings clause should be interpreted narrowly and that Dedeaux's claims could not be saved because his common law claims could not be viewed as laws that "regulate[d] insurance" as they were not specifically directed toward the insurance industry. *Pilot Life*, 482 U.S. at 50, 107 S. Ct. at 1554. The Court also looked to the intent of Congress that the civil enforcement provisions of ERISA be the exclusive vehicle for actions brought by ERISA plan participants and beneficiaries, who assert claims for improper processing of benefits. *Id.* at 52-54, 107 S. Ct. at 1555-57.

In 1995, the Supreme Court issued its opinion in *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) (hereinafter "*New York Blues*"). The issue in *New York Blues* was whether ERISA "pre-empts the state provisions for surcharges on bills of patients whose commercial insurance coverage is purchased by employee health-care plans governed by ERISA, and for surcharges on [health maintenance organizations (HMOs)] insofar as their membership fees are paid by an ERISA plan." *Id.* at ___, 115 S. Ct. at 1673-74. The district court in the case had determined that the New York surcharge law was preempted by ERISA because the surcharges would affect commercial insurers and HMOs, and, therefore, indirectly affect ERISA plans by increasing plan costs. *Id.* at ___, 115 S. Ct. at 1675. The Second Circuit affirmed the decision of the district court and cited *Shaw v. Delta Air Lines* and *Ingersoll-Rand v. McClendon* in support of its finding of broad preemption. *See Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 717-19 (2d Cir. 1993), *rev'd*, ___ U.S. ___, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995).

The Supreme Court rejected the conclusions of the Second Circuit and essentially turned the tide on the expansion of the preemption doctrine:

> The governing text of ERISA is clearly expansive. . . . If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere," H. James, Roderick Hudson xli (New York ed., World's Classics 1980). But that, of course, would be to read Congress's words of

> limitation as a mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality. That said, we have to recognize that our prior attempt to construe the phrase "relate to" does not give us much help drawing the line here.

Id. at ___, 115 S. Ct. 1677. The Court next cited the often-quoted language in *Shaw* that defined a law "relat[ing] to" an employee benefit plan as one that " 'has a connection with or reference to such a plan.' " *Id.* at ___, 115 S. Ct. 1677 (quoting *Shaw*, 463 U.S. at 96-97, 103 S. Ct. at 2900). After acknowledging that the statute in question made no reference to an employee benefit plan, the Court hinged its analysis on interpreting the phrase "connection with" from *Shaw*. The Court then stated:

> But this still leaves us to question whether the surcharge laws have a "connection with" the ERISA plans, and here an uncritical literalism is no more help than in trying to construe "relate to." For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections. We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.

Id. at ___, 115 S. Ct. at 1677. The Court went on to reason that a reading of the preemption provision that is so broad as to displace "all state laws affecting costs and charges on the theory that they indirectly relate to ERISA plans . . . would effectively read the limiting language in § 514(a) out of the statute. . . . " *Id.* at ___, 115 S. Ct. at

1679. This conclusion, the Court stated, would contradict the "basic principles of statutory interpretation" and would go against the Court's prior determination that a state law is not preempted when the law has too tenuous a connection with the ERISA plan. *Id.* at ___, 115 S. Ct. at 1679-80. The Court concluded:

> While Congress's extension of pre-emption to all "state laws relating to benefit plans" was meant to sweep more broadly than "state laws dealing with the subject matters covered by ERISA[,] reporting, disclosure, fiduciary responsibility, and the like," *Shaw*, 463 U.S., at 98, and n. 19, 103 S. Ct. at 2900, and n. 19, nothing in the language of the Act or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern. . . .

Id. at ___, 115 S. Ct. at 1679-80 (citations omitted).

C. Application to Morstein's Claims

While the narrow holding in *New York Blues, i.e.*, state laws that govern general health care regulation and affect ERISA plans only by means of indirect economic effects are not preempted, is not particularly relevant to the instant case, the broad guidance that the Court gave in analyzing a state law is helpful. Using the analysis outlined by the Supreme Court in *New York Blues*, we look to see whether the state law claims brought by Morstein have a "connection with" the ERISA plan. To determine that, we examine whether the claims brought fit within the scope of state law that Congress understood would survive ERISA.

The Fifth Circuit has found that Congress did not intend for ERISA preemption to extend to state law tort claims brought against an insurance agent. *Perkins v. Time Ins. Co.*, 898 F.2d 470, 473 (5th Cir. 1990). Such preemption, reasoned the Fifth Circuit, would "immunize agents from personal liability for their solicitation of potential participants in an ERISA plan prior to its formation." *Id.* We now adopt the rationale of the Fifth Circuit as stated in *Perkins* and hold that when a state law claim brought against a non-ERISA entity does not affect relations among principal ERISA entities as such, then it is not preempted by ERISA. To the extent that any of our prior opinions differ from this holding, they should be deemed overruled.[9]

Morstein is a plan beneficiary who is bringing a suit against the insurance agency and agent who allegedly fraudulently induced her to change benefit plans. The insurance agent and agency are not ERISA entities. ERISA entities are the employer, the plan, the plan fiduciaries, and the beneficiaries under the plan. *See Travitz v. Northeast Dept. ILGWU Health & Welfare Fund*, 13 F.3d 704, 709 (3d Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2165, 128 L. Ed. 2d 888 (1994); *Sommers Drug Stores v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1467 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, 107 S. Ct. 884, 93 L. Ed. 2d 837 (1987). Hankins and the Shaw Agency had no control

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[9] We recognize that the factual circumstance now before us is not the only one in which a state law claim will not be preempted by ERISA.

over the payment of benefits or a determination of Morstein's rights under the plan.[10]

In *Variety Children's Hosp., Inc. v. Century Medical Health Plan, Inc.*, 57 F.3d 1040 (11th Cir. 1995), we held that state law fraud claims can be intertwined with benefit plans "where state law claims of fraud and misrepresentation are based upon the failure of a covered plan to pay benefits, the state law claims have a nexus with the ERISA plan and its benefits system." *Id.* at 1042. In *Variety*, the action was brought by a hospital, via an assignment of the claims of the parents of the beneficiary, against the plan itself and alleged that the plan had engaged in fraud and misrepresentation by allegedly denying coverage of an experimental bone marrow transplant performed at the hospital. *Id.* These claims involved ERISA entities, the beneficiary (before assignment), and the plan, and the state law claims were based on an interpretation of the plan's terms. When a state law claim involves the reliance on an insurer's promise that a particular treatment is fully covered under a policy, however,

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[10] Our conclusion contradicts the reasoning offered by this court in *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277 (11th Cir. 1987). There we reasoned that because the preemption doctrine extended to claims brought by an employee against an employer, it must extend to claims against insurance agents as well. "This indicates that the 'broad common-sense meaning' of the term 'relate to,' . . . is quite broad indeed." *Id.* at 281 (citation omitted). Subsequent cases have made clear, however, that employers, unlike independent insurance agents, are ERISA entities and thus much more closely "related to" the plan.

a claim of promissory estoppel is not "related to" the benefits plan. *See Variety* at 1043 & n.5.[11]

Although the remedy sought may affect the plan in that Morstein's damages (should she successfully prevail on her claims) against Hankins and/or the Shaw Agency may be measured based on what she would have received under her old plan, such indirect relation between a beneficiary and the plan is not enough for preemption. *Forbus*, 30 F.3d at 1406-7 (noting that "the mere fact that the plaintiffs' damages may be affected by a calculation of pension benefits is not sufficient to warrant preemption"); *see also Smith v. Texas Children's Hosp.*, 84 F.3d 152, 155 (5th Cir. 1996). The Supreme Court in *New York Blues* made it clear that economic impact alone is not necessarily enough to preempt a state law. *New York Blues*, ___ U.S. at ___, 115 S. Ct. at 1683. Therefore, the possibility that insurance premiums will be higher or that insurance will be more difficult to obtain because independent agents will have less incentive to sell insurance to employers whose employee benefit plans will be governed by ERISA, does not provide a reason to preempt state laws that place liability on agents for fraud. These same agents currently face the threat of state tort claims if they make fraudulent misrepresentations to individuals and entities not governed by ERISA. To hold these agents

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[11] This type of claim can be contrasted with an action brought by a beneficiary against an insurance company regarding the scope of the coverage of the plan. The claim brought by Morstein against Pan-American and National was of the latter type and would be preempted, but Morstein's claims against Pan-American and National are not at issue on appeal.

accountable in the same way when making representations about an ERISA plan merely levels the playing field.

Allowing preemption of a fraud claim against an individual insurance agent will not serve Congress's purpose for ERISA. As discussed above, Congress enacted ERISA to protect the interests of employees and other beneficiaries of employee benefit plans. *See Shaw*, 463 U.S. at 90, 103 S. Ct. at 2896. To immunize insurance agents from personal liability for fraudulent misrepresentation regarding ERISA plans would not promote this objective. If ERISA preempts a beneficiary's potential cause of action for misrepresentation, employees, beneficiaries, and employers choosing among various plans will no longer be able to rely on the representations of the insurance agent regarding the terms of the plan. These employees, whom Congress sought to protect, will find themselves unable to make informed choices regarding available benefit plans where state law places the duty on agents to deal honestly with applicants.

III. CONCLUSION

Morstein challenges the district court's conclusion that her state law claims against an independent insurance agent and his agency for fraudulent inducement to purchase and negligence in processing her application for an ERISA-governed insurance plan are preempted by section 514(a) of ERISA. We conclude that these claims do not fall within ERISA's broad preemptive scope, as they do not have a sufficient connection with the plan to "relate to" the plan. Accordingly, the district court's grant

of summary judgment in favor of Hankins and the Shaw Agency is REVERSED.

Margery A. MORSTEIN, Plaintiff-Appellant,

v.

NATIONAL INSURANCE SERVICES, INC.; Pan American Life Insurance Company; The Shaw Agency; Scott Hankins, Defendants-Appellees.

No. 94-9152.

United States Court of Appeals, Eleventh Circuit.

Feb. 12, 1996.

Appeal from the United States District Court for the Northern District of Georgia

Before KRAVITCH and BIRCH, Circuit Judges, and GOODWIN*, Senior Circuit Judge.

BIRCH, Circuit Judge:

This appeal focuses upon the preemption doctrine under the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. §§ 1001-1461 (1985). The district court found that Morstein's state law claims related to the employee benefit plan established by her employer and, therefore, those claims were preempted by ERISA. We affirm the decision of the district court.

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* Honorable Alfred T. Goodwin, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

I. BACKGROUND

Plaintiff-appellant, Margery Morstein, is the president, director, and sole shareholder of Graphic Promotions, Inc. ("Graphic"). At all times relevant to this appeal, Morstein was also one of two employees of Graphic. In 1991, Morstein met with Scott Hankins, an insurance broker and employee of the Shaw Agency, for the purpose of obtaining a replacement policy of major medical insurance for herself and Graphic's other employee. The policy was to be administered by National Insurance Services, Inc. ("National") and underwritten by Pan-American Life Insurance Company.[1] Morstein alleges that during her meeting with Hankins, she advised him that any policy of major medical insurance that would replace her current policy would be unacceptable if it excluded from coverage medical treatment related to any preexisting medical condition. Morstein asserts that Hankins assured her that the policy that he proposed would provide the same coverage for preexisting conditions as her current policy. The policy offered by Hankins was issued to Graphic, and Graphic paid the initial premium.

Over one year after the policy was issued, Morstein had surgery involving a total hip replacement. When she submitted a claim for payment for this procedure, National refused payment because it asserted that Morstein's surgery involved a preexisting condition, which she failed to disclose during the application process. National

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[1] Morstein voluntarily dismissed National Insurance Services and Pan-American Life Insurance Company before the commencement of this appeal, although defendants in the original action.

then rescinded the policy and refunded the premium payments to Graphic that were made on behalf of Morstein. Because she claims that Hankins and the Shaw Agency fraudulently induced her to purchase a policy of major medical insurance, Morstein allowed a separate full-coverage insurance policy to lapse. In doing so, she further alleges that Hankins and the Shaw Agency were negligent in processing her application for insurance and that she has state law claims against them for negligence and fraud.

Morstein filed an action in state court, alleging negligence, malfeasance, misrepresentations, and breach of contract. Defendants removed the action to federal court on the basis that Morstein's claims constituted an ERISA action. The district court denied Morstein's motion to remand and found that defendants were entitled to summary judgment as to the state law claims against them. The district court concluded that Morstein's claims "clearly relate to the employee benefit plan established by Graphic Promotions; therefore, those claims are preempted by ERISA." R2-29-3. Morstein now appeals the district court's grant of summary judgment. We review a grant of summary judgment *de novo*. *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1404 (11th Cir.1994) (citing *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1459 (11th Cir.1992)), *cert. denied*, ___ U.S. ___, 115 S.Ct. 906, 130 L.Ed.2d 788 (1995).

II. DISCUSSION

Morstein alleges that the district court erred in applying the preemption doctrine under ERISA to bar her state

law claims. Section 1144(a) of ERISA provides that its provisions "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a). . . . " 29 U.S.C. § 1144(a) (1985) (emphasis added). A state law "relates to" an employee benefit plan if the law "has a connection with or reference to such a plan." *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 139, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990) (quoting *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983)). The Supreme Court has endorsed a broad interpretation of the phrase "relate to" that extends to preempt certain state law tort and contract actions brought by employees. *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 47-48, 107 S.Ct. 1549, 1553, 95 L.Ed.2d 39 (1987). The Supreme Court does acknowledge some limits to ERISA preemption: "[S]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw,* 463 U.S. at 100 n. 21, 103 S.Ct. at 2901 n. 21 (citation omitted).

In determining whether Morstein's state law claims against Hankins and the Shaw Agency are related to Graphic's employee benefit plan, we must examine our circuit precedent in this area. The facts of the case before us are analogous to those in *Farlow v. Union Cent. Life Ins. Co.,* 874 F.2d 791 (11th Cir.1989). In *Farlow,* plaintiff was a shareholder, president, and member of the board of directors of Pace-Plus, Inc. Farlow and his wife were designated beneficiaries under Pace-Plus's employee benefit plan. The Farlows alleged that an insurance agent

induced them to purchase a new group health life insurance plan, and that the insurance agent fraudulently misrepresented that, among other things, the new policy would provide the same coverage as the company's old policy. *Id.* at 792. After switching to the new policy, Farlow's wife became pregnant. The Farlows then discovered that, unlike Pace-Plus's old policy, the new policy did not provide maternity or pregnancy coverage. *Id.*

Our court found the conduct alleged by the Farlows to be "intertwined" with the refusal to pay benefits:

> [T]he conduct alleged in these claims is not only contemporaneous with [the insurer's] refusal to pay benefits, but the alleged conduct is intertwined with the refusal to pay benefits. Finding the Farlows' state law claims not wholly remote in content from the [insurer] plan, we reject the Farlows' contention that simply because their claims invoke misconduct in the sale and implementation of the [insurer's] plan, their claims do not relate to the plan.
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> Consequently, we hold that ERISA preempts the Farlows' misrepresentation and negligence claims.

Farlow, 874 F.2d at 794.[2] The facts in the case before us are quite similar to those in Farlow. As in Farlow, Morstein

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[2] Our recent holding in *Variety Children's Hosp. v. Century Medical Health Plan, Inc.*, 57 F.3d 1040, 1042 (11th Cir.1995), reiterated that state law fraud claims can be intertwined with benefit plans:

> We agree with the Fifth Circuit's analysis in *Hermann Hosp. v. MEBA Medical and Benefits* Plan, 959 F.2d 569, 578 (5th Cir.1992), that where state law claims of fraud and misrepresentation are based upon

claims the insurance agent made a fraudulent misrepresentation regarding the coverage provided by the new policy. Like Farlow, Morstein claims that her state law causes of action are not preempted by ERISA because they are not related to the plan. We are bound by the precedent set by this court in Farlow and other cases in this circuit and hold that Morstein's state law claims are preempted by ERISA.[3]

> the failure of a covered plan to pay benefits, the state law claims have a nexus with the ERISA plan and its benefits system. Therefore, Counts II and III were correctly dismissed as preempted.

[3] The writer continues to be concerned about the law of this circuit by which this panel is bound. This case presents yet another example of an employee left without a remedy because of ERISA's broad preemption. *See Sanson v. General Motors*, 966 F.2d 618, 623 (11th Cir.1992) (Birch, J., dissenting), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1578, 123 L.Ed.2d 146 (1993). I continue to express my regret that the reach of ERISA preemption too often undermines the stated purpose of the Act: to protect employees and beneficiaries of employee benefit plans. 29 U.S.C. Sec. 1001 (1985). This is an issue that I hope will be revisited by our circuit soon.

I note that some district courts in our circuit have attempted to distinguish *Farlow* and provide a remedy for the plaintiffs before them. *See Wiesenberg v. Paul Revere Life Ins. Co.*, 887 F.Supp. 1529, 1532-33 (S.D.Fla.1995); *Barnet v. Wainman*, 830 F.Supp. 610, 613 (S.D.Fla.1993); *Martin v. Pate*, 749 F.Supp. 242, 246-47 (S.D.Ala.1990), *aff'd sub. nom Martin v. Continental Investors*, 934 F.2d 1265 (11th Cir.1991). Other circuits have found ways to stay the preemption tide in cases similar to the one before us. *See Perkins v. Time Ins. Co.*, 898 F.2d 470, 473 (5th Cir.1990) (concluding that "a claim that an insurance agent fraudulently induced an insured to surrender coverage under an existing policy, to participate in an ERISA plan which did not provide the promised coverage, 'relates to' that plan only

Morstein attempts to distinguish Farlow by arguing that, unlike the insurance agent in that case, Hankins was acting as Morstein's agent, not the agent of the Shaw Agency. Thus, she argues that, "[i]t defies credibility to suggest that an agent of a plan beneficiary, whose duties effectively terminate upon the establishment of a 'plan,' is insulated by ERISA from liability resulting from his malfeasance in performing duties for the benefit of the beneficiary." Appellant's Brief at 9. We do not find that the relationship between Hankins and Morstein differs from the relationship between the insurance agent and the plaintiff in Farlow.[4]

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indirectly" and "does not affect the relations among the ERISA entities" and thus is not preempted by ERISA); *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157, 162 (6th Cir.1989) (reasoning that preemption applies "to a state law claim only if Congress has provided a remedy for the wrong or wrongs asserted"), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 1166, 107 L.Ed.2d 1068 (1990).

We acknowledge that our circuit has placed some limits on the preemption doctrine when there is no nexus between the state law claim and an ERISA covered plan. *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1244 (11th Cir.1989). We also recently held that ERISA preemption does not bar a state law claim of negligent misrepresentation brought by a health care provider against an insurer. *Lordmann Enterprises, Inc. v. Equicor, Inc.*, 32 F.3d 1529, 1534 (11th Cir.1994) (reasoning that there is no preemption because "ERISA does not provide a cause of action for aggrieved health care providers that treat ERISA participants"), *cert. denied*, ___ U.S. ___, 116 S.Ct. 335, 133 L.Ed.2d 234 (1995).

[4] We note that this circuit has held that ERISA preemption extends to claims against an insurance agency or broker, such as the Shaw Agency, as well as an insurance company that issues the policy. *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277, 281 (11th Cir.1987) (claims by parents who where beneficiaries of an

Bound together with Morstein's agency argument is her contention that Hankins and the Shaw Agency are not each a "party in interest" and therefore are not governed by ERISA. 29 U.S.C. § 1002(14) (Supp.1995). While intriguing, this argument does not hold any weight under the facts before us. In Farlow we looked not to the relationship between the parties but to the relationship between the alleged conduct and the refusal to pay benefits. If the actions of a party, regardless of his "interest" in the plan, are intertwined with the refusal to pay benefits, then the action is related to the plan, and thus, it is preempted.

Morstein also argues that *Forbus,* supports her argument that her state law claims are not preempted. *Forbus,* however, is distinguishable from this case. In *Forbus,* we found no preemption because the plaintiffs' claims centered on alleged fraud by Sears concerning the elimination of plaintiffs' jobs, not fraud relating to the amount or availability of pension benefits to the plaintiffs. *Forbus,* 30 F.3d at 1406. Here, Morstein's fraud allegations related to the availability of benefits for a preexisting medical condition.

III. CONCLUSION

Morstein challenges the district court's conclusion that her state law claims against Hankins and the Shaw Agency are preempted by ERISA. We conclude that we

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insurance program provided by their employers, for medical and surgical benefits and for bad faith and fraud by the insurer were "related to" the employee benefit plan and therefore preempted by ERISA).

are bound by the precedent established by this circuit in Farlow and its progeny. Accordingly, the district court's grant of summary judgement is AFFIRMED.

GOODWIN, Circuit Judge, Specially Concurring:

The application of ERISA preemption in removed cases arising out of insurance twisting, common law fraud in the inducement, or other illegal selling practices is not consistent in this circuit, or between circuits. I concur only because *Farlow v. Union Central Life Ins. Co.*, 874 F.2d 791 (11th Cir.1989) appears to bind this court to a rule that need not be cast in concrete, if it is wrong.

In *Farlow,* the plaintiffs alleged that the defendant insurance agent wrongfully induced them to switch to a new insurance policy by false representations that the new policy he was selling would provide the same coverage as the old policy being replaced. The new policy did not, however, provide pregnancy and maternity coverage, which Mrs. Farlow learned to her dismay after she became pregnant. The Eleventh Circuit held that ERISA preempted the Farlows' claims:

[A] state law cause of action "relates to" an employee benefit plan if the employer's conduct giving rise to such claim was not "wholly remote in content" from the benefit plan. . . .

The Farlows' complaint alleges that [the insurance agent] negligently failed to disclose that the Union Central plan did not provide maternity and pregnancy coverage and fraudulently misrepresented that the Union Central plan's coverage was coextensive with [the] former plan's coverage. [The] conduct alleged in these

claims is not only contemporaneous with Union Central's failure to pay benefits, but the alleged conduct is intertwined with the refusal to pay benefits. Finding the Farlows' state law claims not wholly remote in content from the Union Central plan, we reject the Farlows' contention that simply because their claims involve misconduct in the sale and implementation of the Union Central plan, their claims do not relate to the plan.

874 F.2d at 794.

The Fifth Circuit, a year later, announced a different rule. *Perkins v. Time Ins. Co.*, 898 F.2d 470 (5th Cir.1990). In *Perkins*, as in *Farlow*, the plaintiff alleged that he was fraudulently induced by the defendant insurance agent into surrendering coverage under an existing policy in order to participate in an ERISA plan that did not provide as broad coverage as the old. The insurance agent told the plaintiff that his daughter's eye conditions, which required surgery, would be covered under the new policy rather than excluded as a preexisting condition. That representation was false, and when the plaintiff's claim for benefits for his daughter's eye surgery was denied, he sued the agent for fraud. The Fifth Circuit held that ERISA did not preempt the claim:

Giving the ERISA "relates to" preemption standard its common-sense meaning, we conclude that a claim that an insurance agent fraudulently induced an insured to surrender coverage under an existing policy, to participate in an ERISA plan which did not provide the promised coverage, "relates to" that plan only indirectly. A state law claim of that genre, which does not affect the relations among the principal ERISA entities (the

employer, the plan fiduciaries, the plan, and the beneficiaries) as such, is not preempted by ERISA.

Farlow, 898 F.2d at 473 (citations omitted).

The obvious tension between the Eleventh Circuit's holding in *Farlow* and the Fifth Circuit's holding in *Perkins* has affected the district courts. *See, Martin v. Pate*, 749 F.Supp. 242 (S.D.Ala.1990), *aff'd without op. sub nom. Martin v. Continental Investors*, 934 F.2d 1265 (11th Cir.1991). There, a district judge, after reading *Perkins*, gave *Farlow* a narrow interpretation and found no ERISA preemption in a fraud in the inducement case "quite similar" to *Farlow*. *Martin*, 749 F.Supp. at 246. As noted, we affirmed, but without opinion, creating a covert intra-circuit conflict in our own doctrine.

In *Martin*, the plaintiff sued an insurance agent for fraud in the inducement, alleging that the agent knew or should have known of the plaintiff's preexisting heart condition, and that despite such knowledge the agent represented that the new insurance policy would cover the condition. The insurance company refused to pay benefits because of plaintiff's failure to disclose the condition.

Noting with approval the Fifth Circuit's decision in *Perkins*, the district court reasoned that application of state fraud law would not result in regulation of an ERISA plan: "What will be regulated is conduct on the part of defendants, engaged in prior to the time plaintiff became a beneficiary under the plan, i.e., representations made to induce plaintiff to enroll under the plan." *Id.* The district court admitted that it was "cognizant" of *Farlow*, then proceeded to criticize *Farlow* for relying on a case

that was not, in the district court's opinion, authority for finding preemption in fraud in the inducement cases. *Id.* at 247.

As a visiting judge from still a third circuit, one is diffident about characterizing the conflict between *Farlow* and *Martin* as a hazard to navigation for the district courts of this circuit. But compare *Beal v. Jefferson-Pilot Life Insurance Company,* 798 F.Supp. 673 (S.D.Ala.1992) with *Barnet v. Wainman,* 830 F.Supp. 610 (S.D.Fla.1993).

In *Beal,* the plaintiff exercised a retirement option to convert his ERISA group employee benefit plan to an individual policy. The ERISA group plan contained language to the effect that coverage would be similar after conversion to the individual policy. The plaintiff suffered a heart attack, and learned to his financial chagrin that many medical expenses were not covered by his new policy. In his lawsuit, the plaintiff claimed that he had been fraudulently induced to purchase the new policy, and that, but for the fraud, he would have recovered benefits under the old policy. Holding the plaintiff's claim preempted by ERISA, the district court followed *Farlow* and distinguished *Martin.*

In *Barnet,* the plaintiff alleged that an insurance agent fraudulently and negligently advised him that his failure to reveal certain preexisting medical conditions on an application for a health insurance policy would not affect his coverage under the policy. When he applied for benefits, his application was disallowed and his insurance rescinded on account of his failure to disclose his preexisting condition. Holding that the plaintiff's claim was

not preempted by ERISA, the district court distinguished *Farlow* and followed *Martin*.

Given the demonstrated difficulty faced by the district courts, and the real possibility that *Perkins* is more consistent than *Farlow* with federalism, state anti-twisting statutes, and the intent to benefit workers which underlies the ERISA scheme, it may be timely and appropriate to suggest an en banc review of the preemption matter. There is no apparent sign that ERISA filings are declining in the district courts, and it is not impertinent to suggest that clear direction from the Circuit is in order.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARGERY MORSTEIN, Plaintiff, v. NATIONAL INSURANCE SERVICES, INC., PAN-AMERICAN LIFE INSURANCE COMPANY, THE SHAW AGENCY, and SCOTT HANKINS, Defendants.	)	CIVIL ACTION NO. 1:92-cv-2686-RLV

ORDER

(Filed Jan. 25, 1994)

This matter is before the court on the defendants' motions for summary judgment, the plaintiff's motion to compel discovery by the Shaw Agency, and the plaintiff's motion for leave to amend complaint.

During all times relevant to this case, the plaintiff was employed by and was president, director, and the sole shareholder of Graphic Promotions, Inc. On March 27, 1991, the plaintiff met with Scott Hankins for the purpose of discussing major medical insurance coverage for herself and for the other employee of Graphic Promotions.

The plaintiff alleges that Mr. Hankins was informed that she had major medical insurance in force at the time and was further informed of her medical history. The policy was intended to replace the policy of insurance

then in force and, according to the plaintiff, Mr. Hankins assured her that the policy would not exclude from coverage any medical conditions material to the instant action.

The plaintiff alleges that during the meeting Mr. Hankins completed an application for a policy of major medical insurance for the plaintiff and Graphic Promotions' other employee. The policy was to be administered by National Insurance Services, Inc., and was to [be] underwritten by Pan-American Life Insurance Company. At the end of the meeting, the plaintiff signed the application and tendered payment for the initial premium. On May 1, 1991, the policy, underwritten by Pan-American, was issued by National Insurance Services.

In July 1992 the plaintiff underwent a surgical procedure involving a total hip replacement. The plaintiff thereafter submitted a claim for payment to National Insurance Services, but National Insurance Services refused to pay the claim, based on its assertions that the surgery involved a preexisting condition and that the plaintiff had failed to disclose that condition during the application process.

National Insurance Services then rescinded the policy and refunded the premium payments made by or on behalf of the plaintiff. The plaintiff then filed this action in state court, asserting claims for negligence, malfeasance, misrepresentations, and breach of contract. The defendants removed the action to this court on the basis that the plaintiff's claims constitute an action which arises, in whole or in part, under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.

§ 1001, *et seq.* By order dated March 22, 1993, this court denied the plaintiff's motion to remand.

The defendants[1] moved the court to grant summary judgment on the grounds that the plaintiff's state law claims against them are preempted by ERISA. Section 1144(a) of ERISA provides that ERISA "supersedes any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The Supreme Court has interpreted that provision broadly so that a state law claim "relates to" an employee benefit plan "if it has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97, 103 S.Ct. 2890, 2900 (1983). The court finds that the plaintiff's claims against each of the defendants clearly relate to the employee benefit plan established by Graphic Promotions; therefore, those claims are preempted by ERISA. The defendants are entitled to summary judgment as to the state law claims against them.

The plaintiff moved the court to allow her to amend her complaint to add claims against the defendants under ERISA. The defendants argue that the plaintiff's motion should be denied because of inexcusable delay, prejudice to the defendants, and futility. While the court recognizes that the plaintiff has been aware of the ERISA issues for some time and has sought leave to amend at a late date, the court cannot find that the delay in itself is grounds for

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[1] The Shaw Agency and Mr. Hankins filed a motion for summary judgment, which was joined by the other two defendants. Pan-American Life Insurance Company and National Insurance Services subsequently filed a separate motion for summary judgment.

denying the motion to amend. The factual bases underlying the ERISA and state law claims are sufficiently similar that the defendants will not be prejudiced by the proposed amendment.

With regard to the ERISA claims against Mr. Hankins and the Shaw Agency, the court finds that the proposed amendment would be futile. The plaintiff seeks benefits and a declaration of her rights under the terms of the group benefits plan. Neither Mr. Hankins nor the Shaw Agency has any control over the payment of benefits or a determination of the plaintiff's rights under the plan. The court finds that no claims under ERISA exist against Mr. Hankins or the Shaw Agency and, therefore, amendment of the complaint to include counts XIV and XV would be futile.

National Insurance Services and Pan-American argue that the amendment as to them would be futile as well because the plaintiff misrepresented her medical history and, therefore, she is not entitled to any benefits. In addition, the defendants maintain that they are not liable for the misconduct of either Mr. Hankins or the Shaw Agency. While those assertions may or may not be dispositive of the case, the record before the court at this time is insufficient to make such a determination. Moreover, it is not clear that National Insurance Services and Pan-American are wholly inappropriate parties for the plaintiff's ERISA claims.

Based on the foregoing, the defendants' motions for summary judgment as they relate to the state law claims are hereby GRANTED. The plaintiff's motion to amend the complaint is DENIED as to defendants Hankins and

the Shaw Agency and GRANTED as to defendants National Insurance Services and Pan-American. The plaintiff's motion to compel discovery is DENIED as moot.

SO ORDERED, this 24th day of January, 1994.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-9152

MARGERY A. MORSTEIN,

Plaintiff-Appellant,

versus

NATIONAL INSURANCE SERVICES, INC.;
PAN AMERICAN LIFE INSURANCE COMPANY;
THE SHAW AGENCY; SCOTT HANKINS;

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Opinion February 12, 1996,
11th Cir., 1996, ___ F.2d ___)

(April 11, 1996)

Before TJOFLAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges.

BY THE COURT:

A member of this court in active service having requested a poll on the suggestion of rehearing en banc and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.